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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

—v.—

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF, *AMICUS CURIAE*

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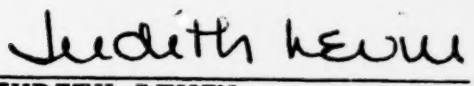
The American Civil Liberties Union respectfully moves, pursuant to the Court's Rules, for leave to file the within brief amicus curiae. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondents has refused consent.

The ACLU is a nationwide, non-partisan organization of over 200,000 members, dedicated to preserving and protecting the civil liberties guaranteed by the Constitution and the Bill of Rights. Like others who have studied the Religion Clauses of the First Amendment, we have been forced to confront the competing and conflicting claims of Free Exercise and Non-establishment, and our efforts to resolve those claims have led to experience which we believe can assist the Court.

Against the arguments of those who argue that neutral, non-discriminatory legislation infringing the Free Exercise of religious belief is constitutional, the ACLU has long concluded that such infringement is barred by the First Amendment absent compelling governmental necessity. We successfully pressed that argument upon the Court as counsel for petitioner in Jones v. Opelika, 319 U.S. 103 (1943) in a tax context, and as amicus curiae in Sherbert v. Verner, 374 U.S. 398 (1963), in the unemployment compensation context present here.

Succeeding years have produced no reason for the ACLU to retreat from its positions in those cases, or for the Court to reverse those vital decisions. We submit this brief amicus curiae to urge the Court to reaffirm the constitutional commitment to the spirit of toleration for religious practice that the First Amendment was enacted to foster and protect.

Respectfully submitted,



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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE

Interest of Amicus

The interest of the Amicus appears in the foregoing motion.

QUESTIONS PRESENTED

This case presents two difficult questions of constitutional law and principle, both of which depend, for their resolution, upon the interpretation of Sherbert v. Verner, 374 U.S. 398, (1963) still the landmark decision on the duty of the states to accommodate the free exercise interests of their citizens and residents:

First, does Sherbert apply to the case at hand? Has Indiana, that is to say, a constitutional duty, under its unemployment compensation scheme, to treat the petitioner's religiously motivated refusal to continue his employment in the production of war material as tantamount to involuntary dismissal? Sherbert held that South Carolina had such an obligation in the case of a Saturday Sabbatarian who refused to make herself available for Saturday work.

Second, assuming its applicability, is Sherbert's holding that there is such a duty of accommodation defensible in the face of criticism a) that the imposition of that duty violates the Establishment Clause by favoring religion over non-religion and b) that in any case Sherbert goes further,

in finding a duty to accommodate, than the principle of free exercise would seem to require?

ARGUMENT

I. SHERBERT v. VERNER CONTROLS THIS CASE IN ALL ESSENTIALS OF FACT, LAW AND CONSTITUTIONAL PRINCIPLE

A. Facts

In its opinion, the Indiana Supreme Court observes "that there are significant differences between Thomas' situation and that involved in Sherbert." See Appendix at 35A. We disagree.

The Indiana Court incorrectly argues, at 37a, that petitioner's "dilemma does not equal a violation of the kind of cardinal religious tenets at stake in Sherbert, involving work on one's Sabbath and the pressure to violate religious precepts or not to work at all."

It is inappropriate for courts to determine which concededly religious tenets are "cardinal" or more central to exercise of religious belief than others. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). In any event, petitioner's beliefs are of an importance that is constitutionally indistinguishable from Sherbert's.

Like Sherbert, petitioner is a member of a millennial Christian Protestant sect that gives primacy to individual conscience informed by scriptural interpretation. As a Jehovah's Witness, petitioner must look to his own "Bible-trained conscience" for an absolute rule of conduct.

By a stubborn and insistent tradition that has brought them into this and other courts with some frequency, Jehovah's Witnesses "pursue peace with all men." 1/ As a group, they consistently eschew military or political commitments that compromise, or even appear to compromise, their loyalty to a coming divine order.

1/ This Court has examined the religious claims of Jehovah's Witnesses in a long series of cases where state regulations conflicted with the free exercise of religious belief. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940); Jones v. Opelika, 316 U.S. 584 (1942), reversed 319 U.S. 103 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Niemetko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953). In each of these cases, this Court reversed the decision of the highest state courts on the ground that state action had disadvantaged the appellants because of their religious beliefs.

They do not call it pacifism but in secular terms it comes to nothing less. "For the weapons of our warfare are not fleshly..." See under "war", Watchtower Bible and Tract Society, Make Sure of All Things (1965). Thus many Jehovah's Witnesses, during the Second World War, refused not only military service but alternative service as well - even in civilian institutions. See Beckford, The Trumpet of Prophecy: A Sociological Study of the Jehovah's Witnesses, 22-38 (1975).

Non-participation in war and war-related activities is, in short, a "cardinal" tenet of petitioner's religious faith. His co-religionists counseled him to apply this doctrine to his work once transferred to the turret line, and, consulting his own faith and belief, he did so.

Although Indiana purports to find the distinction between a general foundry and a tank assembly line over-subtle and confused in the context of a largely or even exclusively war-related manufacturing plant, the state's own assessment of the logic

of petitioner's beliefs is irrelevant. [2] What is crucial is that the belief according to which petitioner acted was religious, Pet. 35a and further that petitioner made clear to his employers and others who needed to know his willingness and availability for work.

In this case the petitioner has contended from the time of transfer that a return to the foundry - now partially

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2/ Any notion that the petitioner was frightened by his work - and so asked for a transfer out of fear rather than scruple - seems to us to misconstrue his comments at Petition for Certiorari at 34a [hereinafter cited as "Pet. 34a"], on bomb scares and the like, which, in his words "really imprinted on my mind exactly where I was working..." The Review Board itself, and the referee, made no such mistake, finding as a fact - a finding left intact by every court below - that Thomas left work for religious reasons. See Pet. 35a. The simple fact that another Jehovah's Witness accepted the work petitioner refused proves, at most, the highly individualized nature of Jehovah's Witness Christianity.

closed - would be acceptable to him. Assuming, as we must, that Blaw-Knox could not transfer him back, he had no choice but to resign either his employment or his convictions.

Sherbert held herself out as available for work on any day of the week but Saturday. The petitioner here holds himself out as available for work on any production line not engaged directly in the manufacture of weapons. The respective conscientious reservations are closely analogous in at least three respects: first, they conform to a reasonable standard of general availability for work; second, they conform to the requirements of the original employment in question; and, third, while they occasion an election between religious observance and job performance, they do so through no change in the employee's preferences or convictions - but solely through changes in the requirements of the respective employers.

B. Law

Indiana's scheme of unemployment compensation disqualifies as ineligible, among others, those insured and unemployed persons who "voluntarily [left] employment without good cause in connection with work...." Ind. Code §22-4-15-1. Both the referee and the Review Board itself found that the petitioner left "due to his religious convictions" but "without good cause in connection with the work...." See Pet. 9a.

The South Carolina scheme in Sherbert similarly disqualified as ineligible, among others, those insured and unemployed persons who have "failed without good cause... to accept available suitable work when offered...by the employment officer or employer...." S.C.S., Tit. 68, §68-114-3-a-ii. The South Carolina Employment Security Commission found that, despite her religious objection to Saturday work, Sherbert had, in fact, failed without good cause to accept "suitable work when offered...." See Sherbert v. Verner, 374 U.S. 398, at 401.

Indiana decisions in this area, while emphasizing "liberal" construction of the

statute, Massengale v. Review Board, 132 Ind. App. 587, 178 N.E. 2d 557 (1961), similarly insisted that "good cause," in cases of "voluntary" termination, must be "objective" and not "subjective," must arise, that is, from the employment situation itself. Geckler v. Review Board of the Indiana Employment Service Division, 244 Ind. 473, 193 N.E.2d 357 (1963).[3/] South Carolina's decisions, prior to and including Sherbert, put essentially the same point in terms of "personal reasons" for employment termination. In both cases, the unemployed workers insisted on a constitutional obligation in the State to treat

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3/ Thus, the decision below cannot be defended on the ground that Indiana accepts Sherbert, and permits religiously-based "good cause" for quitting, but that petitioner simply failed properly to bring himself within the exception. The Indiana Supreme Court expressly relied on the ground that Sherbert did not apply "to those who voluntarily [sic] quit work". Pet. 31a. The Court held that "good cause which justifies voluntary termination must be job-related and objective in character." Pet. 29a.

religious conviction, albeit subjective or personal, as "good cause." Sherbert upheld that claim.

In purpose, in terms, and in administration, then, the two statutory schemes in question would seem virtually indistinguishable. Both seek to alleviate the economic difficulties of "persons unemployed through no fault of their own." Ind. Code §22-4-1-1. In the interests of economies of administration and cost both disqualify - as voluntary, personal, and without good cause - religiously compelled unemployment. Both fall under the same constitutional principle.

C. Constitutional Principle

The majority opinion in Sherbert is explicit in its all-but-sole reliance upon the free exercise clause of the First Amendment: "In view of the result we have reached under the...guarantee of free exercise of religion..." 374 U.S. at 410. At several points the holding is stated and restated in these terms:

Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.' Everson v. Board of Education, 330 U.S. 1, 16. 374 U.S. at 411 (emphasis in original).

* * * * *

Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling [of South Carolina] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition

> of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. at 404.

Because the Court found the disqualification from unemployment benefits to "impose [a] burden on the free exercise of appellant's religion," albeit an unintended and indirect burden, ibid. at 403-4, it required of South Carolina a showing of some countervailing and compelling state interest. South Carolina was held to have made no such showing. 4/ Indiana in this case has not even attempted it, either below or in its opposition to certiorari.

Although Justice Brennan's opinion for the Court notes that the "unconstitutionality of the disqualification of the

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4/ South Carolina suggested in Sherbert a compelling state interest in maintaining such disqualifying standards in order to prevent fraudulent claims, and to increase cost-saving and efficiency. Sherbert found those interests, both as applied and on their face, inadequate as a justification of the denial of exemptions. 374 U.S. at 407. See also infra n.8.

Sabbatarian" on Free Exercise grounds is "compounded" by a further religious discrimination against Saturday worshippers and in favor of Sunday worshippers, Sherbert at 406-7, the various opinions in Sherbert make clear that the decision rested firmly, and independently, on the Free Exercise ground. 5/

5/ This is clear from the language referring to the relative disadvantaging of Saturday worshippers as "compound[ing]" the previously established "unconstitutionality" under Free Exercise analysis 374 U.S. at 406-7. Neither Justice Stewart's concurrence, nor Justice Douglas', relied in any way on the establishment objection to the South Carolina statutory scheme. The dissents of Justices Harlan and White also took Sherbert to rely solely on the Free Exercise ground, and dissented because although accommodation was in their view permissible, they did not believe it was compelled by the Free Exercise Clause. Braunfeld v. Brown, 366 U.S. 599, (1961) decided not many terms earlier, also makes implausible any interpretation of Sherbert as resting solely on the ground that South Carolina had improperly accommodated only Sunday worshippers. Subsequent cases, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) and TWA v. Hardison, 423 U.S. 63 (1977), make clear that state

(footnote cont'd next page)

In short, contrary to Indiana's attempt at distinguishing Sherbert simply as an equal-protection-free religions case, Opp. to Cert. at 6, the more generous principle on which Sherbert was plainly decided, and for which it stands, is that a state, absent a compelling countervailing interest, has a duty to take reasonable steps to accommodate the free exercise interests of its religious citizens. Cf. Trans World Airlines v. Hardison, 423 U.S. 63 (1977)

(footnote cont'd from previous page) accommodation to Free Exercise claims presents no Establishment Clause difficulties and that Sherbert's acceptance of the accommodation principle is now firmly embedded in First Amendment jurisprudence. Our no doubt imperfect survey of district and appeals court decisions citing Sherbert, over some seventeen years, yields not one citation for the proposition that the controlling principle in Sherbert was South Carolina's negligible "establishment" of Sunday Sabbatarianism.

(42 U.S.C. §2000e). The rule of Sherbert is that in a program of temporary insurance benefits for periods of unemployment, an otherwise willing and able insured worker who through no fault of his own - and indeed through no change in his own convictions or practices - finds himself put to a choice between conscientious religious observance and satisfactory job performance must at least be allowed to argue, as "good cause," his religious and conscientious incapacity. That principle controls this case, and requires reversal of the judgement below.

II. REASONABLE ACCOMMODATION TO PETITIONER'S FREE EXERCISE CLAIMS IS MANDATED BY THE FIRST AMENDMENT.

Unless it is to be overruled, Sherbert is firm authority for the proposition, central to petitioner's case, that conflict between Free Exercise claims and state regulatory authority must be resolved by reasonable state accommodation to free exercise of religious beliefs. See also Wisconsin v. Yoder, 406 U.S. 205 (1972); see generally Tribe, American Constitutional Law, at 819-834 (1978).[6/]

There has been some academic criticism of Sherbert, some suggesting that the Sherbert exemption is an invalid establishment of religion insofar as it favors, say, Saturday Sabbatarians over Saturday football fans--or even devoted parents who would spend Saturdays with their children.

[6/] As previously noted, even Justices Harlan and White, in dissent, thought that accommodation was permitted by the First Amendment, although they did not believe it was compelled. Sherbert at 422. Justice Harlan, at least, further believed that accommodation would have to broadly extend to conscientious beliefs. See, e.g., Welsh v. United States, 398 U.S. at 333 (1970) (Harlan, J., concurring); see also Walz v. Tax Commission, 397 U.S. 664, 694 (1970); United States v. Seeger, 380 U.S. 163 (1965).

This was the position taken, even before Sherbert, by Professor Kurland. See his Of Church and State and the Supreme Court, 29 U.Chi.L.Rev. 1(1961). See also Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 Yale L.J. 593 (1964). And, more recently, it is the position consistently and vigorously advocated by Professor Ely. See his Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1313 (1970), and also his Democracy and Distrust (1980). Professor Ely proceeds from the general proposition that disadvantageous impact of state regulation and classification never warrants, by itself, judicial invalidation. Only when such impact permits an inference of invidious or discriminatory motivation, he argues, should it trigger court scrutiny. Sherbert, he concedes, 79 Yale L.J. at 1319, "plainly stands for the contrary view, that a regulation's unintended adverse impact upon persons of a particular faith can invalidate it." But "the course of action thus suggested by the Court--granting exemption only to religious persons--is supremely suspect under the establishment clause...." Welsh and its companions, as Professor Ely reads them, are the proof of his argument: Any exemption

for free exercise, if it is to escape the establishment critique, must be so broad as to be unworkable - and would "in practice inevitably favor religious objectors." Id. at 1321.

We disagree.

A doctrine of neutrality as between religion and non-religion so austere and restrictive as that suggested by Professor Ely would in fact suggest an incoherence in the First Amendment itself, which, after all, gives a special place to the free exercise not of conscience simply, or personal preference, but of religion. This is not to say that Welsh and the like are wrong in broadening and extending the constitutionally permissible - and indeed constitutionally requisite - horizons of what we mean by the term "religion." The logic of the Establishment Clause forces us in fact to break away from any merely conventional notion of what counts as religion. But some core notion of "religion" - such as the Court elaborated in Seeger and Welsh - is compelled by the very wording of the Religion Clauses of the First Amendment. Wisconsin v. Yoder, 406 U.S. at 215. Without it, constitutional analysis in this area would founder even where an invidious regulatory or administrative motivation is claimed,

since the First Amendment argument must always have it that "I am discriminated against - or unduly burdened - because of my religion."

Why, after all, did the Framers make special provision for the free exercise of religion? The historical experience, no doubt, accounts for it well enough: those who knew religious persecution wanted no more of it. See generally Everson v. Board of Education, 330 U.S. 1, 27-74 (1947)(Rutledge, J.- dissenting). But at the center of that historical experience is an idea of the place of religious conviction - and its analogue, deeply-held moral principle - in human experience. To put it quickly and simply: A believer cannot argue with his God. What Holmes called the "can't helps" - and religious pacifism and Sabbatarianism are surely two of the most compelling we know - simply cannot easily be evaded in the ordinary human scheme. To ask Sherbert to work on Saturday, or Thomas to assemble tanks, is to ask them to do something of which they are in human fact virtually incapable - not physically, of course, but conscientiously and perhaps even psychologically.

To insist upon the accommodation of such conscientious incapacity, under the Free Exercise Clause, is only in the most abstract

sense to establish one religion over another, or religion over non-religion.

More concretely, and more plainly, it is to respect an incapacity in human beings which, however "subjective," lies very near the heart of our moral and constitutional traditions. Reasonable differences will remain, no doubt, over what is or is not to be fostered and protected, particularly against unintended regulatory or classificatory burdens. But it is unreasonable to the point of fanaticism to insist that no such exemptions can be granted in any case. This would be to take what we all acknowledge to be the dilemma of a Constitution providing both for free exercise and against establishment, and resolve it by insisting, simply and almost magically, that it go away - taking with it the protection that surely both clauses were meant to afford to the likes of Sherbert and Thomas. "The course of constitutional neutrality," this Court said in Walz, "cannot be an absolutely straight line; rigidity could defeat the basic purpose of these provisions...." 397 U.S. at 669.

And so, even while it has recognized the tension between the Religion Clauses, the Court nonetheless has properly followed Sherbert and has continued to accord constitutional protection to Free Exercise claims

where they arise in the context of requests for exemption from otherwise valid regulatory statutes. See, e.g., Wisconsin v. Yoder; cf. TWA v. Hardison. See generally Tribe, American Constitutional Law, at 851-853. The constitutional rule is settled: where, as here, a state has plainly interfered with the Free Exercise of a religious belief - that is, prevented a believer from applying his beliefs to the conduct of his life - the state can succeed only if it demonstrates interest of sufficiently compelling magnitude to override the Free Exercise claim. Wisconsin v. Yoder, 406 U.S. at 214; Sherbert, 374 U.S. at 402.[7/]

Were Thomas asking for an unreasonable accommodation, an exemption that would seriously impair substantial state interests - if, for example, he claimed that his religious beliefs rendered him unavailable for any remunerative work - then this would be a different

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[7/] The interest that the state must assert is not its general interest in maintaining the underlying regulatory program for unexceptional cases, but rather a particular interest in denying a religious exemption. See, e.g., Wisconsin v. Yoder, where the Court accepted the strong state interest in advanced compulsory education but found insufficient reason to deny a religious exemption claim. See generally Tribe, American Constitutional Law, at 855-857.

case. For example, the court in Yoder implied that a claim for exemption from all compulsory education, rather than two additional years beyond the eighth grade, might well have led to a different result, and it had previously emphasized that Sherbert was "not a case in which an employee's convictions serve to make him a non-productive member of society." 374 U.S. at 410. Different facts, as the Yoder Court noted, may well lead to a different balancing of free exercise and state interests. But unreasonable accommodation, as Sherbert and Yoder make clear, has proven to be a workable constitutional standard.[8/] The states have lived with it and, generally, made it work. And it has been adopted by Congress, and applied by this Court, in a statutory context. See TWA v. Hardison, supra (applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e).

8/ In a different context, the Court has decided that facially neutral governmental regulation incidentally infringing free speech rights will be struck down where the "incidental restriction is...greater than essential to the furtherance "of the governmental interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).

To those who find themselves at odds with the conventional views of such things as war, worship, and revelation, this rule is a shield against the more or less daily threat of subtle, or not so subtle, ostracism and discrimination. Those, like Thomas, Yoder, and Sherbert, who wager much of their lives on absolutes unacceptable or unpersuasive to the rest of us, have found in the rule at issue the tolerance for religious belief and the religiously-informed life that the Free Exercise Clause was designed to foster and protect.

CONCLUSION

For the foregoing reasons, the judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted,

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